DOI: 10.12797/Politeja.10.2013.23.12

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SEPARATE, EQUAL, OR SEPARATE-BUT-EQUAL?

THE CHANGING IMAGE OF RACE IN THE U.S. SUPREME COURT'S DECISIONS

ABSTRACT There is no doubt that the United States were not created as a purely democratic state. On the one hand, it established basic rules and principles of democratic government such as free elections, sovereignty of the nation, fundamental rights and freedoms of individuals or independent judiciary. All of these principles were, however, enjoyed only by the part of American society: free elections were guaranteed for white men, excluding women and blacks; sovereignty belonged to the nation, i.e. white women and men, because slaves were not considered citizens; fundamental rights and freedoms were guaranteed only for whites; institutional independence of the judicial branch did not prevent the system from injustice towards the blacks. Furthermore, one of the most important values of democratic society, equal protection of law, was absent in the original constitutional document of 1787, as well as the provisions of Bill of Rights. The clause became part of U.S. constitutional reality yet in 1868 when the Fourteenth Amendment was enacted, as a direct result of social and political changes caused by the civil war. After introducing the Thirteenth Amendment in 1865, which abolished slavery, the government took a step forward by making all citizens equal in 1868 and by providing black Americans with suffrage rights in 1870. For former slaves it meant a milestone step in their fight to destroy the social and political boundaries which limited their basic rights and freedoms. However, before the above mentioned events took place, the period of injustice and exploitation occurred with the U.S. Supreme Court in the middle of social and political tensions. The main purpose of the article is to show the changing attitude of the U.S. Supreme Court with regard to the social and political status

of African-Americans. This attitude influenced historical and contemporary social relations among the American society proving one of the most controversial aspects of U.S. democracy.

KEY WORDS U.S. Supreme Court, judicial review, racial segregation, equal protection of law, constitutionalism

INTRODUCTION

When one wonders about the true spirit of America, envisioned often in the 220-years-old words of the Founding Fathers, or in the later-created myth of so-called "American Dream", it is difficult to imagine that the terms "democracy", "rule of law" or "equal justice to all" were used very often to justify... inequality. There is no doubt that the United States of America were not created as a fully democratic state. On one hand it established constitutional rules and principles of democratic government such as free elections, sovereignty of the nation, fundamental rights and freedoms of individuals or independent judiciary. All of these principles were, however, enjoyed by only part of American society: free elections were guaranteed for white men, not including women and African-Americans; sovereignty belonged to the nation, i.e. white women and men, because slaves were not considered citizens; fundamental rights and freedoms were guaranteed only by the federal government and were not enjoyed by slaves; and institutional independence of the judicial branch did not prevent the system from injustice towards African-Americans. Furthermore, one of the most important values of democratic society, the equal protection of law, was absent in the original constitutional document of 1787, and in the provisions of the Bill of Rights, fundamental guarantees of the free society. The phrase "equal protection of law" became part of the U.S. constitutional reality in 1868 when the Fourteenth Amendment was enacted as a direct result of social and political changes caused by the civil war. After introducing in 1865 the Thirteenth Amendment which abolished slavery, the government took a step forward by equalizing all of the citizens before law in 1868 and by providing African-Americans with suffrage rights in 1870. For former slaves it meant a milestone step in their fight to destroy the social and political boundaries which limited their basic rights and freedoms.

However, before the above mentioned events, the period of injustice and exploitation occurred with the U.S. Supreme Court in the middle of social and political tensions. It is important to acknowledge that thanks to its unique ability to check the constitutionality of federal and state laws, the Court became the main actor responsible for interpretation of particular terms, phrases, clauses and provisions of the U.S. constitution[1]. Thus also in cases concerning the legal status of racial minorities, their social po-

[1] The power of judicial review was adopted by the Court itself in *Marbury v. Madison* 5 U.S. 137 (1803).

sition, scope of their rights and freedoms, as well as the issue of slavery in general, the Justices of the Court had their final say, which was binding and shaped the direction of U.S. politics towards Negroes/African-Americans. For example, a few years before the civil war, the Court adjudicated in *Dred Scott v. Sandford*, in which it determined that slavery could be indirectly derived from the Constitution thus throwing a rock into the stream of racial tensions between the North and the South of the country. It was not, however, the last controversial decision of the highest judicial tribunal referring to social relations and social position of black Americans. In 1896 a case *Plessy v. Fergusson* was decided, and despite the existence of the equal protection clause of the Fourteenth Amendment, the Justices affirmed constitutionally-based segregation by creating the so-called "separate but equal" doctrine. As a result, for more than fifty years, public places such as schools, offices, libraries or means of transportation had been divided into areas for the white and black citizens. The two above-mentioned examples are just the tip of the iceberg, as throughout its history the Supreme Court very often confronted the controversial issues of racial relations within the U.S. society.

The main purpose of the article is to show the changing attitude of the Supreme Court Justices with regard to the social and political status of Negroes/African--Americans. Apart from analysis of the two milestone cases, *Dred Scott* and *Plessy*, it is worth observing how in numerous decisions the Court interpreted the scope of equal protection of law clause, influencing everyday life of millions of American citizens, who longed for more than 150 years for formal freedom from any kind of discrimination. The analysis shall prove that the Court's attitude towards Negroes/African-Americans influenced historical and contemporary social relations among the American society becoming probably the most controversial aspect of U.S. democracy in its history[2].

SLAVERY AS THE FOUNDATION OF THE STATE

Before addressing the controversies set out by the adjudication of the Supreme Court, one should definitely observe, that since the very beginning of American statehood the problem of racism and slavery had been present. Even during colonial times, ships full of slaves landed at the East Coast of the continent, spreading about five hundred thousand of cheap labor force to various British colonies. As Peter Irons observes, the importation of Africans into colonies began around 1620, and all of the colonies (both Northern and Southern) accepted the institution of slavery creating soon so-called

[2] It is worth observing, that all of the cases analyzed in this paper concern the constitutional status of African-Americans in U.S. history, but every researcher would easily point out lack of decisions regarding other racial minorities, such as Latin-Americans or Japanese-Americans. There were of course landmark cases concerning the equal protection of the mentioned social groups, some of which were highly controversial (*Hirabayashi v. United States* (320 U.S. 81, 1943), *Korematsu v. United States* (323 U.S. 214, 1944), *Hernandez v. Texas* (347 U.S. 475, 1954)), but the main purpose of my research was to show the changing attitude of the Supreme Court towards African-Americans, as it dominated in the Court's docket over other issues.

"black codes" designed on one hand to confirm servile status of Africans, and on the other to protect their owners from any form of slaves' insubordination[3]. By the year 1700 slaves made only 5% of total population of the colonies, but during the 18th century their number increased rapidly and before the American Revolution they made at least one fifth of the population of many colonies, while in Virginia and Maryland almost one third of the inhabitants had African origins[4]. Apart from officially legalizing slavery, many colonies established drastic rules concerning the status of the colored people: in Virginia, the courts declared that children born to a slave mother automatically became slaves[5]. Therefore, it was already established practice in the 17th and 18th century, that all of the important political positions in colonies, as well as all benefits stemming from various legal guarantees of equality, related to white men, leaving black slaves with a different taste of justice. How in this light should one interpret the words of the famous *Declaration of Independence* guaranteeing equality to every person? The document, which laid in 1776 the foundations for the existence of a new nation and state, referred to many values and rights of the people, but – similarly to the federal constitution of 1787 – it did not abolish the institution of slavery, rooted since then on American soil for many decades.

First effort to limit slavery came from the Continental Congress, the body of delegates of the colonies, which, acting upon *Articles of Confederation of 1777*, banned slavery in the federal territory. According to Anthony Iaccarino, although many of the Founding Fathers acknowledged that slavery violated the core American revolutionary ideal of liberty, their simultaneous commitment to private property rights, principles of limited government, and intersectional harmony prevented them from making a bold move against slavery[6]. Therefore, the decision of the Continental Congress did not influence the legal status of black people in all thirteen colonies, where slavery was untouched, as well as it was not followed by the constitutional document of 1787, which indirectly authorized the trade of the Africans in the United States of America. During the Constitutional Convention held in Philadelphia, most of the delegates were not willing to address the problem of slavery, as they were owners of slaves themselves, but it did not mean that all of the Founding Fathers were proponents of the slave trade. Benjamin Franklin, for example, very often stated his reluctance to the brutal treatment of the Africans, not only in the British colonies but also other places of the world where they were used as cheap labor force: *Can the sweetening our tea with sugar be a circumstance of such absolute necessity? Can the petty pleasure thence arising to the taste compensate for so much misery produced among our fellow creatures, and such a constant butchery of the human species by this pestilential detestable traffic in the bodies*

3 P. Irons, *A People's History of the Supreme Court*. New York 2000, pp. 13-14.

4 P. Jenkins, *A History of the United States*, New York 2007, p. 13.

5 L.R. Monk, *The Words We Live By. Your Annotated Guide to the Constitution*, New York 2000, p. 206.

6 A. Iaccarino, 'The Founding Fathers and Slavery' in *The Founding Fathers. The Essential Guide to the Men Who Made America*, Hoboken 2007, pp. 66-67.

and souls of men?[7] Regardless of individual opinions, the majority of delegates opted for upholding the unequal status of Africans in the new country, what was envisioned in the constitution of 1787.

Firstly, by declaring the sovereignty of the nation in the Preamble, the Founding Fathers gave the right to vote to white property-owners, thus excluding women, men without property, and of course slaves. Secondly, for purposes of estimating the number of representatives chosen by particular states to the House of Representatives, the Constitution allowed to count slaves as three-fifths of a person, which was a compromise between the delegates supporting and neglecting slavery[8]. As a result, five slaves were counted as three people, and states owning more black persons could benefit by having larger representation in the lower chamber of Congress. In the same part of the document, the federal Congress was prohibited to end the trade of slaves before the year 1808, what generally meant legally-established termination of importing the foreign slaves, but in reality it did not stop the procedure of slave trade within the borders of the United States[9]. At a first glance, it might seem obvious that the content of these provisions was a result of necessary compromise between the southern and northern delegates to the Constitutional Convention, but according to Akhil Amar, there were many clauses in the document which actually strengthened slavery. Not only Article One did confirm the unequal status of Negroes, but also Article Two handed slave states extra seats in the Electoral College, the presidents could in turn nominate proslavery judges based on Article Three, and Article Four obliged free states to send fugitive slaves back to slavery[10]. In sum, the federal constitution could be regarded as a document promoting neither slavery, nor equality. But facts are obvious: by not abolishing the unequal status of black members of the society, after 167 years from the arrival of first slaves to America, the constitution set the scope of social and political relations within the new country. Time was to prove, that the country needed the next 167 years of inequality in order to reshape these social and political relations. The main actor in this respect became the U.S. Supreme Court which has begun the process of constitutional interpretation since the beginning of the 19th century.

INTO THE DIRECTION OF WAR

It is the province and duty of the judicial department to say what the law is[11] – these words stated by Chief Justice John Marshall seem crucial for the understanding of the role of the U.S. Supreme Court in American legal and political system. Justice Marshall and his Court provided a basis for the exercise of judicial review, i.e. the power of the judicial

7 L.R. Monk, *The Words We Live By...*, p. 57.

8 Article One, Section 2, Clause 3.

9 Article One, Section 9, Clause 1.

10 A.R. Amar, *America's Constitution. A Biography*, New York 2005, pp. 20-21.

11 *Marbury v. Madison* 5 U.S. 137 (1803).

department to declare acts of other branches of government null and void, in the case of their inconsistency with the federal Constitution. What it really meant, however, was the beginning of judicial interpretation of the Constitution, which has been now exercised for more than 200 years, making judges the most powerful and influential actors in the U.S. political and legal scene[12]. This case influenced not only the scope of American constitutional law, but it also allowed the courts to control other branches of government, changing the primary meaning of the checks and balances system. The judiciary was to become stronger and very often superior to the executive and legislative branches of government, gaining more power than the Framers had agreed to grant it during the Constitutional Convention[13]. Despite the fact, that the law was created by other institutions in the legislative process, either on federal or state level, when the law allegedly violated someone's rights, the case could be taken to the courts and thanks to the appealing procedure could even reach the highest judicial instance. Indeed, statistically only 5% of cases that every year reach the U.S. Supreme Court are granted hearing by the Justices, but if the dispute touches upon an important legal or social issue, then the Justices are willing to make their decision without hesitation. The analysis of the history of Court's adjudication proves that the racial issues have become a vital subject for the highest judicial instance in the United States, at least in crucial moments of American statehood.

Since 1803, when the Court gained the power of judicial review and was able to interpret the Constitution, the issues of slavery and social status of Negroes had not been put on the docket to often until the mid-century. There were, however, cases which showed the attitude of the early Justices towards these issues, i.e. *Prigg v. Pensylvania* and *Jones v. VanZandt*[14]. The *Prigg* case, despite its reference to the problem of slavery, concerned the division of powers between the federal government and the states. It confronted the constitutionality of Pennsylvania's law which prohibited moving black people out of the state's territory in order to enslave them. A slaveholder named Edward Prigg argued that the state law violated the U.S. constitution's provisions concerning extradition of slaves among states. The Supreme Court confirmed Prigg's argumentation declaring the unconstitutionality of Pensylvania's law, and stating that it was the power of the federal government to enforce any slave laws established by the states[15]. Despite the fact, that the decision did not directly address the problem of slavery, the lack of the Court's opinion in this matter meant silent support of slavery by the majority of the Justices. The second dispute concerned the legal status of nine slaves who escaped from

[12] There have been many books concerning the real position of the U.S. Supreme Court in American political system. The newer, valuable titles are: M. Tushnet, *Taking Constitutional Away From the Courts*, Princeton 2000; K.W. Starr, *First Among Equals. The Supreme Court in American Life*, New York 2002; K.E. Whittington, *Political Foundations of Judicial Supremacy. The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, Princeton 2007; S. Kautz et al. (eds.), *The Supreme Court and the Idea of Constitutionalism*, Philadelphia 2009.

[13] P. Laidler, *Basic Cases in U.S. Constitutional Law*, vol. 1: *Separation of Powers*, Cracow 2005, p. 15.

[14] 41 U.S. 539 (1842) and 46 U.S. 215 (1847).

[15] 41 U.S. 539 (1842).

their owners in the direction of the free territory and were given help by VanZandt. Before reaching the 'promise land' they all were caught by slaveholders what led to a later accusation of VanZandt, as his behavior violated then-existing *Fugitive Slave Act*[16]. When the case reached the Supreme Court in 1847, the Justices had to decide about the constitutionality of the Act, what would also show their attitude towards slavery. The Court admitted that the *Fugitive Slave Act* was consistent with the Constitution and it was the power of the states to decide about the status of slavery on their territory[17]. Both disputes may serve as an appetizer to the main decision made by the Court ten years later, but even individual analysis of Justices' opinions in *Prigg* and *VanZandt* affirms then-used methodology of constitutional interpretation, called often the originalist approach[18]. The Supreme Court consisted of people who maybe did not openly support slavery, but at the same time read the constitutional document with regard to its original meaning set by the Founding Fathers. And because the original attitude of the document towards slavery was clear, there was no vivid discussion among the members of the highest judicial instance in the United States about the scope of the rights of Negroes. There is no doubt that such an approach was consistent with the general direction of U.S. policy, as there were first signs of insubordination of Southern states for which the issue of slavery was vital and unchangeable[19]. However, social and political reaction to Court's adjudication in slavery matters was yet to become significant for U.S. history, and everything went down to one controversial decision of 1857.

Many prominent scholars have analyzed the *Dred Scott* decision thoroughly. There is no dispute to its direct and indirect effects, which finally led to the worst interior conflict America has ever had. But it would be an exaggeration to state that the civil war broke out because of the Supreme Court's decision. Tensed social relations between the North and the South, different approach to slavery and growing economic disparities are the most common arguments used to explain the reasons of the conflict. On the other hand, the 1857 opinion of the Court inscribes into social and political tensions of those days. The dispute concerned a slave from Missouri, Dred Scott, who had been living for almost ten years in states and territories where slavery was prohibited. After some time he decided to sue his master, Sandford[20], in order to gain freedom, claiming that his residing in free territories made him a free man. The majority opinion written by Chief Justice Roger Taney determined the legal situation of Dred Scott, considering him as a slave because of lack of citizenship. Furthermore, the Court negated the possibility of slaves becoming U.S. citizens in future, thus shocking the inhabitants of

16 9 Stat. 462 (1850).

17 46 U.S. 215 (1847).

18 Theory of originalism is analyzed by Professor Vicki C. Jackson in her new book *Constitutional Engagement in Transnational Era* (New York 2010, pp. 20-22).

19 Since 1814 the problem of nullification became present in U.S. political reality, but it was used for the first time in 1832 by South Carolina. Nullification meant the right to nullify any federal law by the state, but from the perspective of the supremacy of federal law it was unconstitutional. The problem became a sharp division between the states just before the civil war.

20 In reality his name was Sanford, but his name was misspelled in official records.

the North. Basing their opinion on an interpretation of Articles Three and Four, the Justices acknowledged that never in American history had a slave become a citizen, and so the tradition must be upheld[21]. The outcomes of the case were highly controversial: slaves were not only deprived of U.S. citizenship but also of any chance of gaining it in future; federal territories were not able to end slavery anymore, as only states had such rights; and, by calling Negroes "beings of an inferior order" the Court deepened racial disparities in the whole country.

List of the critics of the *Dred Scott* decision is very long, and it is even impossible to try to write it down. Some call Justice Taney's opinion the worst judicial ruling in American constitutional history[22], but there are others moving the responsibility to the Founding Fathers regarding them as racists who sympathized with slavery[23]. Some declare the Chief Justice the worst evil that could happen in U.S. judicial history predicting, that *the name of Taney is to be hooted down the page of history*[24]. Others insist on analyzing the *Dred Scott* case from a wider perspective, as it did not exist in isolation to the direction into which the whole country went at this time[25]. However, all agree, that the 1857 opinion established legal and political consent so as to the status of Negroes leaving them without any guarantees of personal or property rights. Linda Monk goes even further in her suggestions, saying that the *Dred Scott* decision *nationalized slavery by allowing slaveholders to bring slaves into any part of Union*[26]. No matter how controversial the decision tends to be, it is worth observing, that since the *Marbury* ruling, the 1857 precedent was the first to declare a congressional act unconstitutional, therefore Chief Justice Taney used the earlier established institution of judicial review to reach a verdict sanctioning inequality and racism. The interpretation of the Constitution was based in general on the originalist approach, and it referred to the most undemocratic principles that had ever existed in the U.S. constitutional doctrine. Despite the fact, that the majority of Justices confirmed Chief Justice's vision, one should notice that there were dissenting opinions in the *Dred Scott* case, written by the Justices McLean and Curtis.

Especially the opinion of Benjamin R. Curtis is worth analyzing, as it proves that there was no unanimity on the Court and some Justices opposed slavery in the proposed form finding the reasoning of Roger Taney unconstitutional. In his dissent,

21 60 U.S. 393 (1857).

22 C.L. Eisgruber, 'The Story of Dred Scott: Originalism's Forgotten Past' in M.C. Dorf (ed.), *Constitutional Law Stories*, New York 2004, p. 151.

23 H.J. Storing, 'Slavery and the Moral Foundations of the American Republic' in R.H. Horwitz (ed.), *The Moral Foundations of the American Republic*, Charlottesville 1986, p. 313.

24 Senator Charles Sumner of Massachusetts cited in: P. Finkelman, 'The Taney Court (1836-1864). The Jurisprudence of Slavery and the Crisis of the Union' in C. Tomlins (ed.), *The United States Supreme Court. The Pursuit of Justice*, Boston 2005, p. 76.

25 For the thorough analysis of the *Dred Scott* legacy see: C.B. Swisher, *The Taney Period, 1836-1864*, New York 1974 (vol. 5 of O.W. Holmes' *History of the Supreme Court of the United States*); or in: D.E. Fehrenbacher, *The Dred Scott Case. Its Significance in American Law and Politics*, New York 1978.

26 L.R. Monk, *The Words We Live By...*, p. 207.

Justice Curtis pointed out that the Constitution never used the word slavery, and while referring to African-Americans it always used the term "persons" (in contrary to the majority's argument). He stressed, that *slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself and agreed by all writers on this subject, but is inferable from the Constitution, and has been explicitly declared by this Court*[27]. Although such statement did not suggest abolishing slavery, it led to conclusion, that slavery differed from other property rights and could not been subject to constitutional due process clause. The reference to natural rights seems today obvious, but was rarely used by any judge at that time, so Justice Curtis' argument sounds unique among other members of the Court. It may lead to an assumption that Chief Justice's reasoning could be based on different arguments and should not have gone as far as it had. Looking from theoretical perspective, one would consider the Supreme Court as an institution easing tensions and solving problems, but in 1857 the Justices, bound by their own opinions and by undemocratic history of U.S. constitutionalism, decided to go the other way. History showed how wrong that decision occurred to be.

THE EQUAL PROTECTION OF LAW?

The civil war, which broke out as a result of longstanding conflict between social, economic and political approach to life of the Northern and Southern states, proved devastating for both sides of the conflict, showing the lack of unity of the United States of America. One of the major problems confronted by the winning side, the Union, was the issue of slavery which divided the country so sharply. President Abraham Lincoln, due to political and military reasons[28], became one of the strongest proponents of ending the infamous tradition of slavery. His Emancipation Proclamation of 1863 freed all slaves under Confederate control who decided to escape to Northern states controlled by the Union. The next step to be taken was to amend the federal constitution which served as a background to all slave acts established since the beginning of American statehood. Despite the fact that Lincoln did not live to see the result of his initiative, most of contemporary African-Americans tend to name him the greatest President in the history of the United States[29]. Indeed, Lincoln's efforts came into force in 1865,

[27] 60 U.S. at 624 (1857).

[28] There are voices that despite his enormous influence on equalization of African-Americans, Abraham Lincoln was not ideologically a proponent of banning slavery. As Philip Jenkins observes, in 1858 Lincoln declared himself implacably opposed to *the social and political equality of the white and black races*. Four years later he explained himself, that his overreaching goal was to save the Union, and as he said: *what I do about slavery and the colored race, I do it because it helps to save this union*. P. Jenkins, *A History of the United States*, p. 134.

[29] Such an approach was visible in the words of Martin Luther King, and also the current President of the United States, Barack Obama. See: B. Obama, *The Audacity of Hope. Thoughts on Reclaiming the American Dream*, New York 2006, pp. 97-98.

when the Thirteenth Amendment to the Constitution was ratified, banning slavery in the whole country. As a result about four million people were freed, and were given opportunity to become the addressees of the Preamble's words *We the People of the United States* for the first time. It is worth observing, that the Amendment automatically abolished the Supreme Court's decision in *Dred Scott v. Sandford*[30], but it did not end all of the legal and social problems of black members of American society. As a political group they still lacked basic rights such as suffrage or equality to the law, and as a social group they were treated like enemies by most of the former slaveholders from Southern states. Therefore, three years after banning the slavery, the Constitution was amended again, in order to solve various legal and social issues concerning the Reconstruction era, one of which was the necessity to establish the equal protection of law clause. The Fourteenth Amendment, directed mainly to the states, referred to the due process of law principle, broadening the necessity to protect life, liberty and property of U.S. citizens by the states. Among citizens, the Constitution included for the first time meant black Americans, whose rights could be asserted in front of U.S. courts. Ending the process of equalization of black Americans, the government enforced one more constitutional amendment which gave them suffrage rights in state and federal elections[31].

The U.S. Supreme Court did not directly confront the slavery issues during the civil war or just at its aftermath. But the next decades opened the possibility to adjudicate in disputes which concerned the actual status of African-Americans in U.S. legal and social reality, thus interpreting the scope of protection afforded to them by the Fourteenth Amendment. In *Slaughterhouse Cases*, which concerned different issues of monopoly in the slaughterhouse business, the Court took time to stress, that *Fourteenth Amendment was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons*[32]. A few years later in *Strauder v. West Virginia*, a dispute regarding the guarantees of the jury service, the Justices declared laws permitting jury service of only white people as unconstitutional[33]. But these two cases were not the most important ones, as the general direction of the Supreme Court's adjudication on African-American rights was totally different, and could be observed in two major disputes in the 1880's and 1890's. First of them,

[30] In general, Congress overruled Supreme Court's precedents only four times in history, by creating constitutional amendments i.e. Eleventh Amendment in 1795 (*Chisholm v. Georgia* 2 U.S. 419, 1793), Thirteenth Amendment in 1865 (*Dred Scott v. Sandford* 60 U.S. 393, 1857), Sixteenth Amendment in 1913 (*Pollock v. Farmers' Loan & Trust Co.* 157 U.S. 429, 1895) and Twenty Sixth Amendment in 1971 (*Oregon v. Mitchell* 400 U.S. 112, 1970).

[31] It is important to acknowledge that at this time the constitution meant black men, as women (of all races) gained suffrage rights yet in 1920 thanks to the constitutional amendment.

[32] *Slaughterhouse Cases*: *Butchers' Benevolent Association of New Orleans v. Crescent City Live-Stock Landing and Slaughterhouse Company*, and *Esteben, et al. v. Louisiana ex rel. Belden* 83 U.S. 16 (1873).

[33] 100 U.S. 303 (1880). The Court's reasoning in *Strauder* was affirmed more than 100 years later in *Batson v. Kentucky*, where the Justices criticized racial discrimination in the process of selecting the jurors. 476 U.S. 79 (1986).

called the *Civil Rights Cases*, consisted of five disputes concerning the constitutionality of the Civil Rights Act passed by Congress in 1875[34]. The Act was one of the last pieces of congressional legislation during Reconstruction era designed to protect Southern black Americans from any infringements and violations, mainly in public facilities. But the Justices of the Supreme Court, led by Joseph Bradley, decided to rule the congressional act unconstitutional, as the federal government was not authorized to create legislation concerning the equality in public facilities. On the contrary, according to the Justices, it was the states' role to establish provisions in that respect, and therefore particular actions undertaken by the white people limiting rights of African--Americans were found consistent with the constitution[35]. As Peter Irons observes, Justice Bradley surprisingly easy found that the Thirteenth Amendment refers only to slaves, and slavery was no longer American problem, so its provisions could not be applied to the case. Furthermore, the Justice treated also the Fourteenth Amendment similarly, concluding that it did not provide any power to prohibit private discrimination which was at stake[36]. Again, one could cite a strong dissenting opinion written in the case by Justice John Marshall Harlan, but it would not change the overall feeling, that the Court, once again, decided to interpret the Constitution in a very narrow manner, allowing racial disparities to expand.

After creating three amendments to the Constitution in order to equalize the legal position of black Americans, it seemed that the legal basis for a major social change had been founded by the government, although in some southern states of the country local governments and members of the society were reluctant to acknowledge this constitutional protection of black citizens of the United States. To prevent the enforcement of the new amendments, especially concerning the suffrage rights and equal protection clause, many governments enacted legislation preventing equalization of the social status of African-Americans. These provisions, called *Jim Crow laws*, established segregation in public facilities, such as transportation, schools, and public offices, but also prevented black citizens from participating in elections by prohibiting illiterates to vote, which in reality concerned mainly former slaves and their families. The U.S. Supreme Court did not have many opportunities to review the *Jim Crow laws* in accordance with the Constitution, but such a situation occurred at the end of the 19th century in *Plessy v. Ferguson*[37]. Homer Plessy, a person who was only one-eighth black, took the train in Louisiana and violated the law which prohibited him to sit in the area designed for white people. When he refused to move to the part of the car intended for black people, he was arrested on the basis of the state law which imposed such segregation in

[34] The names of the cases consolidated in the description *Civil Rights Cases* were: *United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, *Robinson et. ux. v. Memphis & Charleston R.R. Co.*

[35] 109 U.S. 3 (1883).

[36] P. Irons, *A People's History...*, pp. 212-215.

[37] P. Laidler, *Basic Cases in U.S. Constitutional Law*, vol. 2: *Rights and Liberties*, Cracow 2009, p. 121. To read more about *Jim Crow laws* see: J.M. Packard, *American Nightmare. The History of Jim Crow*, New York 2003.

the public transportation system. When his case reached the highest judicial authority in the country, most African-Americans were looking with hope towards the Justices. Seven of them, however, decided to interpret the Constitution narrowly, affirming equality among races, but supporting at the same time the Louisiana law. The doctrine established in the case was called separate-but-equal and meant, in practice, the government's consent for state-based segregation. As Justice Brown stressed, the Court considered *the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it*[38]. For those who analyzed former behavior of the Court in similar situations, the outcome of the decision was not a big surprise – the majority of the Justices affirmed their inability to treat African-Americans equally with white people. If there is any light in the tunnel of the dark side of *Plessy* ruling it is, according to Cheryl Harris, the dissent of Justice John Marshall Harlan, who condemned state-compelled segregation as a system of racial caste inconsistent with the Constitution. In this respect, Harris argues, the decision represents both an egregious endorsement of racial oppression, as well as the promise of rectification as prefigured in Justice Harlan's dissent[39]. Similar arguments were raised by the Chief Justice Warren Burger, who commented on the case almost a hundred year later: *The Court blandly overlooked the pronouncement of 120-years earlier in the "Declaration of Independence" that "All Men are created equal" [...] and gave a cramped reading to the provisions of the Thirteenth and Fourteenth Amendments. [...] But the opinion in Plessy had one merit that could not be found in the Dred Scott case. It was the ringing and eloquent dissent of one Justice, John Marshall Harlan*[40]. In reality, both sides showed consistence with former rulings – the majority of the Court upheld the discriminatory direction of its adjudication, the minority (represented often alone by Harlan) condemned majority's argumentation, thus opposing the *Jim Crow laws*. The result was highly controversial: for the next decades the separate-but-equal doctrine prevailed over the equal protection clause of the Constitution thus continuing the undemocratic character of the U.S. legal system.

Many scholars prefer to move from *Plessy* directly to *Brown v. Board of Education*, which overruled the separate-but-equal doctrine. Not neglecting the obvious logic of such analysis, it is still worth to observe the Court's decision-making process between 1896 and 1954 when *Brown* was decided. The mentioned period may show the attitude of the Justices toward the scope of African-American rights and liberties, especially with regard to death penalty and voting rights. The cases at stake were decided in the late 1930s and in 1940s, what proves that there were more important issues necessary to cover by the Justices, such as federal-state relations, economic reforms, or broaden-

[38] 163 U.S. 537 (1896).

[39] C.I. Harris, 'The Story of Plessy v. Ferguson. The Death and Resurrection of Racial Formalism' in M.C. Dorf (ed.), *Constitutional Law Stories*, p. 182.

[40] W.E. Burger, *It Is So Ordered. A Constitution Unfolds*, New York 1995, p. 131.

ing the scope of due process of law on states[41]. But at the same time one could observe implementation of the separate-but-equal doctrine in the lower courts' cases, most of which never reached the highest judicial tribunal in the United States. The disputes concerned especially the rights of the black accused in criminal trials, who were very often deprived of their fundamental liberties, including life, because of their skin color. Death penalty in the United States had its greatest time ever: in 1930s there were more executions than in any other decade in American history, an average of 167 per year[42]. Statistically the majority of them was imposed on African-Americans what raised numerous doubts and concerns about the arbitrariness of U.S. judiciary. According to Linda Monk, *jurors did not treat like cases alike, and if they followed a pattern, it was based on race. African-Americans were sentenced to death far more often than whites, and defendants executed for rape were virtually always black men charged with attacking white women*[43]. One of such disputes reached the U.S. Supreme Court, which needed to decide upon the constitutionality of repeated execution of an African-American with regard to the meaning of the double jeopardy clause. In *Louisiana v. Resweber*, a 16-year old African-American was sentenced to death and during his execution the electric current passed through his body was insufficient to kill him, therefore he appealed in order to avoid the second attempt of electrocution. In a narrow-margin decision, the Court upheld Resweber's sentence and, despite many concerns about his guilt, ordered second attempt to execute him[44]. The precedent was significant for the development of U.S. constitutional law, as it made the cruel and unusual punishment clause of the Eighth Amendment applicable to the states, but it was also significant for the African--Americans who felt again that the equal protection clause did not always work, as it should.

Not only rights of the accused but also voting rights became an area of fight of African-Americans for more guarantees, particularly if one considers that since 1920 also black women entered the voting American family. Unfortunately for African--Americans the law in the United States was not unified, and legal provisions in various states were different, limiting often voting rights of the black part of the community. Instead of applying the process of unification of the law, the Supreme Court continued to accept the policy of segregation imposed by some of the states or political groups. The

[41] This period of constitutional history is called *dual federalism*, as the Court confronted mainly the issues of federal and state laws which contradicted, deciding cases concerning the scope of governmental intrusion in state and local matters. See for example: *Lochner v. New York* 198 U.S. 45 (1905). Since the 1920's the issues of freedom of speech and of religion became crucial, as the Justices expanded the provisions of *Bill of Rights* on states. See for example: *Gitlow v. New York* 268 U.S. 652 (1925), *Near v. Minnesota* 283 U.S. 697 (1931) or *Palko v. Connecticut* 302 U.S. 319 (1937). But the most problems occurred in the 1930s with the constitutionality of FDR's New Deal program. See for example: *West Coast Hotel v. Parrish* 300 U.S. 379 (1935) or *A.L.A. Schechter Poultry v. United States* 295 U.S. 495 (1935).

[42] For more on that topic see: R. Bohm, *Deathquest. An Introduction to the Theory and Practice of Capital Punishment in the United States*, Cincinnati 1999.

[43] L.R. Monk, *The Words We Live By...*, p. 185.

[44] 329 U.S. 459 (1947).

latter situation could be observed in *Grovey v. Townsend*, where the Court confronted the problem of whites-only restriction during the Democratic primary elections held at the convention of Texas Democratic Party. An African-American, R. Grovey, was not allowed a ballot in the elections and he took the case to court, finally appealing to the highest judicial instance. The Justices confirmed the constitutionality of the Party's restrictions, as it was *a voluntary political association [...] having the power to determine who shall be eligible for membership*[45]. From the legal perspective the case followed the long range of decisions differing state action from private action, but from the social perspective it proved an ongoing willingness of many environments of white people to uphold the practical aspects of racial segregation. Also in another case concerning racial discrimination, *Shelley v. Kraemer*, the Court confirmed that racially restrictive agreements did not violate the Constitution, although if the states wanted to enforce them, then such violation would occur[46]. Not only the Justices' opinion seems controversial, but the facts of the case alone stand as an example of social tensions characteristic for this period of U.S. history. The Kraemers were a white couple who owned a residence governed by an agreement preventing African-Americans from owning property in their neighborhood. The picture is clear: in the wake of 1950s there was a society partly benefiting from the "separate-but-equal" doctrine, there was a government focusing on effects of the world war, as well as economic and political issues of the day excluding the racial segregation, and there was a Supreme Court which was directly responsible for the undemocratic interpretation of the constitutional equal protection of law clause. How is it possible to achieve any change in the way of shaping social relations within a divided country? You need activism of some social groups and you need activism of some of the Justices...

THE MILESTONE CASE – THE REAL REASONING

The change in Court's interpretation of the Constitution with respect to rights of African-Americans took place in the mid-1950s. But it would be a misunderstanding to assume, that the *Brown v. Board of Education* decision stands alone as a milestone in the process of equalization of the black community in America. Such slow changes could be visible a few years earlier, and there are some cases which clearly reveal the evolution of the Justices' approach towards more democratic readings of the supreme law of the land. Among them, the most crucial seem to be: *Smith v. Allwright*, *Beuharnais v. Illinois*, and *Sweatt v. Painter*.[47] In *Smith*, which facts were similar to the ones from *Grovey v. Townsend*, one could observe the process of overruling former infamous decision by the Court, which declared the Party restrictions against black Americans in voting procedures unconstitutional. As Justice Stanley Reed noted, the Court could not

[45] 295 U.S. 45 (1935).

[46] 334 U.S. 1 (1948).

[47] 321 U.S. 649 (1944), 343 U.S. 250 (1952) and 339 U.S. 629 (1950).

allow racial discrimination in elections conducted by a private organization[48]. Different issues were presented in the *Beuharnais* case, as it concerned the distribution of leaflets exhorting to stop the harassment of white people by the black people (called in the leaflet *Negroes*). The question confronted by the Court regarded the constitutionality of Beuharnais' behavior under the free speech clause of the First Amendment. In the majority opinion presented by Justice Felix Frankfurter, five members of the Court rejected to apply First Amendment's protection, because the leaflets were provocative and Beauharnais was convicted of violating the Illinois law, which prohibited distribution of any racially discriminating publications[49]. It is necessary to observe, that at the time the Court rarely limited the free speech clause on the basis of racial discrimination, therefore the outcome of the case marked a change in constitutional interpretation of the rights of African-Americans. Similar, but even far more reaching effect was achieved thanks to the decision made by the Supreme Court in *Sweatt v. Painter*. A black American, Herman Sweatt, applied for admission to the Texas University Law School, but he was not accepted on the grounds of race. The University tried to provide a special number of seats for black people on the grounds of the separate-but-equal doctrine, but Sweatt took his case to the court. In 1950 the U.S. Supreme Court heard the dispute on appeal and found University's action unconstitutional as it violated the equal protection clause of the Fourteenth Amendment. According to the Justices, segregation in the University would harm African-Americans not allowing them to compete or collaborate with white students[50]. What seems interesting, identical decision was reached by the Court with regard to University of Oklahoma in *McLaurin v. Oklahoma State Regents*, which allowed the anti-discrimination organizations (with N.A.A.C.P. in the front row) to announce the end of the separate-but-equal doctrine[51]. Despite both surprising verdicts, the final rulings did not address the problem of segregation in general, but only applied to the functioning of particular Universities. Although the Justices had the possibility to overrule the infamous *Plessy* decision, they preferred to take small steps in the process of ending the racial discrimination.

The milestone step which helped to establish formal legal equality among races in American society was taken by the Supreme Court in *Brown v. Board of Education of Topeka*. Since the *Plessy* precedent black children could not attend schools for white children due to regulations forming segregation in public facilities. Linda Brown was an African-American attending a segregated black school a few miles from her house in Topeka, while there was a school for white children located just a few blocks from where she lived. Her parents challenged the Kansas law, as it established segregation which led to inequalities among children of different racial descent. They filed a suit against the Board of Education of Topeka, which approved of the program and had

[48] 321 U.S. 649 (1944).

[49] 343 U.S. 250 (1952)

[50] 339 U.S. 629 (1950).

[51] In *McLaurin* the Justices found the segregation of black students in University classrooms, libraries and cafeterias unconstitutional. 339 U.S. 637 (1950).

operated it since 1879. The lower courts upheld the law, using as a justification the Supreme Court's decision in *Plessy*. However, the Justices on appeal revised the old precedent, overruling it and thus ending with the separate-but-equal doctrine[52]. The case in question showed sharp divisions between the Justices of the Court, and it was Chief Justice's Earl Warren's role to convince all members of the Court to achieve a proper and unanimous verdict. He was aware of that fact admitting that *he could not escape the feeling that no matter how much the Court wanted to avoid the issue, it had to face it*. Justice Warren stressed, that *the Court had finally arrived at the place where it had to determine whether segregation was allowable in public schools*[53]. In 1954, speaking for the unanimous Court, Chief Justice stated that any kind of separation led to inequality which was forbidden by U.S. Constitution. He proved that segregation process impaired the motivation of black children to learn and that separate educational facilities were inherently unequal. Justices abolished the infamous separate-but-equal doctrine created 58 years earlier, because it meant inequality for minorities, especially in such socially delicate area of public education[54]. As a result, particular states had to resign from enacting laws that promoted any kind of racial separation and segregation, what proved a very complicated process. For example, to ensure that the Court's decision would come into effect, President Dwight Eisenhower (not fully convinced about that) ordered federal troops to Little Rock, Arkansas, so that black children could enter the school. On that day, the President addressed the nation and explained that his duty to uphold the ruling of the Supreme Court was "inescapable"[55]. Notwithstanding the above mentioned example, the language used by the Court in *Brown* was not so optimistic, as many may think. Segal, Spaeth and Benesh notice, that the Court ordered desegregation, not integration, despite giving local federal district courts full responsibility to apply "all-deliberate-speed" mandate. But in reality, for the next fifteen years the Justices ducked school desegregation before ruling that schools were to be immediately desegregated[56].

It is worth mentioning that there were also other reasons than U.S. legal principles which counted in the final verdict of the Court. According to the U.S. government's brief addressed to the Justices of the Court, *the existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination [...] raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith*[57]. There is no doubt that one of the real reasons

[52] 347 U.S. 483 (1954).

[53] From Warren's *Brown* conference. See: B. Schwartz, *The History of the Supreme Court*, New York 1993, pp. 291-295. For more on Warren and *Brown* see: M.R. Belknap, *The Supreme Court under Earl Warren, 1953-1969*, Columbia 2005.

[54] 347 U.S. 483 (1954).

[55] C.J. Pach, E. Richardson, *The Presidency of Dwight D. Eisenhower*, Lawrence 1991, p. 153.

[56] J.A Segal, H.J. Spaeth, S.C. Benesh, *The Supreme Court in the American Legal System*, New York 2005, p. 60. It is important to acknowledge that the quote *all-deliberate-speed* comes from Justice Frankfurter's concurring opinion in *Brown II* (349 U.S. 294, 1955).

[57] Amicus brief for the United States in *Brown v. Board of Education* (1954).

for the necessity to change the segregation laws in the United States was the Cold War period, during which there was not only an open conflict between the U.S. and Soviet Union, but also a strong public relations movement in both states (various diplomatic and propaganda actions) aimed at achieving a better international position. The American government felt that its position in Europe may be weaker because of racial inequalities that occurred in a state which called itself a model democracy[58]. Therefore, the Court was not only bound by particular provisions of the Constitution but also by tremendous pressure from the U.S. government. It does not change the general impact the case had on social relations in the United States, despite the fact it needed a lot more time to come in force, than most of the Justices thought it would in 1954.

AND JUSTICE FOR ALL?

In 1979 a new movie by Norman Jewison was presented in U.S. cinemas under the title *...And Justice for All*, starring young Al Pacino. The movie was a typical court drama telling a story about a young lawyer who began his career full of belief in justice and judicial bipartisanship. However, after some time he discovered that the legal world was not so ideal, and that justice did not work equally for all[59]. After watching the movie the feelings concerning the U.S. legal system are somewhat mixed, as one realizes that the system is not only legitimized by institutions preset to serve the community, but it is often dependent on the people who drive the system into particular direction. For more than 150 years the U.S. Supreme Court has driven American constitutional law into the direction of controversies and ambiguities, especially with regard to the treatment of African-Americans. After their decision in *Brown*, the Justices marked a significant change in their attitude, but by saying A they forced themselves to say B. Such an opportunity occurred after imposition of new federal laws regarding the unification of civil rights and voting rights in the United States. In 1964 Congress passed *The Civil Rights Act* prohibiting *inter alia* race discrimination in places of public accommodation and a year later *The Voting Rights Act* aimed at banning discrimination in election procedures[60]. Soon after these laws came into force their constitutionality was confronted by the U.S. Supreme Court in a series of cases, some of which need brief analysis.

The same year when the *Civil Rights Act* was adopted by Congress, the Court adjudicated in two disputes concerning its constitutionality, *Heart of Atlanta Motel v. United States* and *Katzenbach v. McClung*. In the first case, the owners of a motel in Georgia were charged with violating the Act by not allowing African-Americans to use their services. During the litigation in front of the Supreme Court, they argued that Congress had no power over local motels and could not established federal laws enforc-

[58] For more on this topic see: M.L. Dudziak, *Cold War Civil Rights. Race and the Image of American Democracy*, Princeton 2000.

[59] *...And Justice For All*, directed by N. Jewison, 1979.

[60] P. Jenkins, *A History of the United States*, p. 265. See: Publ. Law 89-110 (1965).

ing them to serve particular social groups. But the Justices had a different opinion and confirmed constitutionality of the *Civil Rights Act* on the basis of the commerce clause of Article One, thus allowing Congress to regulate interstate commerce, to which operation of motels near state highways applied[61]. Despite of legal aspects of the case, it is worth observing, that the majority opinion referred to the necessity of protection of racial minorities against discrimination, thus broadening the scope of the equal protection clause. In another case decided a few weeks later the facts were similar: owners of a restaurant in Alabama refused to serve black Americans, and they were found guilty of violating the *Civil Rights Act*. The *Katzenbach v. McClung* case was brought to the Supreme Court on appeal and was determined in the same way as the Georgia dispute. Justices opposed to the discrimination in restaurants and acknowledged Congress' ability to control the movement of products of interstate commerce[62]. Both cases may serve as an example of the increase of the federal powers over traditional state issues, but are often presented as the Court's final word on desegregation policy of the government.

In the 1960s there have been more disputes concerning racial discrimination and the scope of the equal protection clause, decided by the U.S. Supreme Court. In *Edwards v. South Carolina* the Justices determined the constitutionality of arresting by state police several African-Americans peacefully marching and protesting against the state's policy of segregation. As their actions were not violent, the Court had no problem with stating, that their arrest and convictions were unlawful and violated the First Amendment's free speech and free assembly clauses[63]. Today such a verdict would be obvious for researches analyzing Court's adjudication in free speech matters, but in the early 1960s it sounded revolutionary, as the social group at stake was rarely protected before. Similar conclusions may be reached after analyzing *Brown v. Louisiana* concerning a peaceful sit-in protest by an African-American in a public library[64]. This new standard set by the Justices was, on one hand, the result of their argumentation in *Brown v. Board of Education*, but on the other, a proof that there were more clauses in the Constitution than only the Fourteenth Amendment's equal protection clause, which could be used to ban racial discrimination of any form. Four years later the Court used not only the equal protection argument, but also the right to privacy principles to justify inter-racial marriage. A black woman, Mildred Jeter, married a white man, Richard Loving, what was prohibited under Virginia law. As a result they were charged, found guilty and sentenced to imprisonment, but on appeal the case was brought to the highest judicial instance in the United States. The Court in *Loving v. Virginia* acknowledged that the state law was inconsistent with the Fourteenth Amendment and thus had no legitimate purpose[65]. As a result, Lovings were acquitted, and their case serves as one of the fundamental examples of judicial protection of the right to privacy. The same way as black Americans

[61] 379 U.S. 241 (1964).

[62] 379 U.S. 279 (1964).

[63] 372 U.S. 229 (1963).

[64] 383 U.S. 131 (1966).

[65] 388 U.S. 1 (1967).

began to function normally in public facilities, they also regained proper treatment in private sphere. In *Jones v. Mayer*, a black man sued a company which refused to sell him a house in an area destined only for white people. The Supreme Court not only noticed that the company's action violated federal law aimed at protecting racial groups from discrimination, but it also stressed that imposition of racial barriers in property law backed the country to the times of slavery[66]. Such an argument was used for the first time since *Civil Rights Cases* of 1883, and reveals the growing reluctance of the Justices of the late 1960s towards the controversial and undemocratic past.

While the 1960s were used by the Supreme Court to end the process of racial segregation in public and private facilities, the 1970s produced quite a revolutionary approach towards the interpretation of the equal protection clause. Suddenly the U.S. government realized that more than 150 years of suffering of racial minorities should be justified in a more significant manner than only by approving desegregation. Since the late 1970s various programs called affirmative action had been established in order to make a classification designed to aid members of racial minorities. As time showed there were two basic forms of affirmative action: either setting quotas to reserve a specific number of places for minority members and a specific number for nonminority members, or setting separate standards by giving preferential treatment to minority members without the use of quotas[67]. Soon, the Supreme Court confronted the issue of affirmative action, as it entered universities and schools across the United States, raising many controversies to its constitutionality. One of the most famous cases in which the status of affirmative action was determined, *Regents of the University of California v. Bakke*, took place in 1978. A white man, Allan Bakke, applied for admission to the Medical School, but he did not succeed as the University set quotas for racial minorities. Their affirmative action program reserved 15% of 100 seats for the representatives of racial minorities, and due to that Bakke could not be admitted, although he received the better score than black Americans who were admitted. The result of Court's adjudication was ambiguous and somewhat surprising, as there was no single majority opinion. Four of the Justices stated that any form of government-based racial quotas was forbidden, whereas the other four upheld constitutionality of the School's admission program arguing that affirmative action programs should not be put under judicial scrutiny. The decisive vote was cast by Justice Lewis Powell, Jr., who on one hand criticized the program as being too rigid and forcing the University to admit Bakke, but on the other suggesting that less rigid quotas would be found constitutional in future[68]. According to Keith Whittington, Justice Powell's opinion in *Bakke* became the road map for many institutions designing affirmative action programs, but subsequent Burger Court cases... did little to clarify the legal status of affirmative action[69]. Such

66 392 U.S. 409 (1968).

67 J.E. Nowak, R.D. Rotunda, *Constitutional Law*, St. Paul 2000, pp. 736-740.

68 438 U.S. 265 (1978).

69 K.E. Whittington, 'The Burger Court (1969-1986). Once More in Transition' in C. Tomlins (ed.), *The United States Supreme Court...*, p. 314.

clarification came in Court's 2003 opinion in *Grutter v. Bollinger*, where a white woman was denied admission to Law School in Michigan because of the existence of racial factor in the admission procedures. The Supreme Court, in a narrow-margin decision, supported the Law School's program, because race was only one of many admission criteria, and it served to achieve educational benefits by producing more diverse student body[70]. From the perspective of *Grutter*, it seems obvious that the recent direction of the Court's decision-making process in the area of equal protection of law aims at compensating the tragic history of inequality of African-Americans. Paradoxically, the form in which the Justices want to achieve their goal seems also undemocratic, but now the subject of the discrimination has changed. How in this light should one confront the title of Norman Jewison's movie ...*And Justice For All*?

The problem is that the Court itself is sharply divided over the issues of affirmative action and the form of redressing the balance in U.S. constitutional law. The Justices are arguing about the scope of the equal protection clause, and about constitutionality of certain acts of government aiming at the process of social equalization. Furthermore, not all of the decisions undertaken by the Supreme Court since the late 1960s are favorable for African-Americans. The cases of *Washington v. Davis* and *McCleskey v. Kemp* may serve as good examples in that respect. In the first dispute, two black men brought action against the D.C. Police Department, claiming that the recruitment procedures were discriminatory and violated the equal protection clause of the Fourteenth Amendment. The Court, however, upheld constitutionality of these procedures, stating that they did not constitute any official discrimination based on race, as well as they did not have any discriminatory intent[71]. In *McCleskey* a black man was convicted and sentenced to death, but he appealed stating that the main reason of his sentence was race, as statistically blacks were given the capital punishment more often that representatives of other races in the state of Georgia. The Supreme Court rejected McCleskey's arguments, because he did not prove unlawful character of his death verdict, and statistics could not be treated as a binding evidence of someone's guilt or innocence[72]. The two above-mentioned decisions do not change the general attitude of American law repairing the weakened condition of the words democracy and rule of law. The U.S. Supreme Court is the main actor shaping the current understanding of particular constitutional provisions concerning equality and freedom, trying to provide the impossible: justice for everybody at the same time.

CONCLUSIONS

A careful analysis of the numerous cases decided by the U.S. Supreme Court concerning the constitutional status of black Americans reveals two patterns in judicial operation:

[70] The case was decided along with *Gratz v. Bollinger* 539 U.S. 306 (2003).

[71] 426 U.S. 229 (1976).

[72] 481 U.S. 279 (1987).

continuity and change. Continuity of racial approach may be observed since the very beginning of the process of constitutional interpretation when the majority of Justices silently or openly affirmed slavery (*Dred Scott*), but even after abolishing it by the American government they found ways to uphold laws establishing racial discrimination (*Plessy*) or abolish acts promoting equality (*Civil Rights Cases*), with rare exceptions (*Slaughterhouse*, *Strauder*). The significant change took place in the 1950s and 1960s, when interior pressures, social tensions and political situation (also from international perspective) forced the Court to abandon old and infamous principles and to initiate a difficult process of desegregation (*Brown v. Board of Education*). The continuity of the approach towards desegregation could be observed on one hand in decisions limiting discrimination based on race in public and private facilities (*Katzenbach*, *Heart of Atlanta Motel*), and on the other in verdicts upholding governmental programs aimed at compensating African-Americans more than 150 years of inequality (*Grutter*). Today the Supreme Court is divided so as to the scope of the equal protection clause interpretation but the differences are slight compared to those occurring more than hundred years ago (Harlan v. the rest of the crew in *Plessy*). Nevertheless the best way to describe contemporary approach of the Justices is the word: uncertainty (or ambiguity). The narrow-margin verdicts reached in a few recent cases shows ambiguous future for the equal protection cases.

My research did not present all of the cases decided in racial matters by the Supreme Court, but definitely the most important disputes which marked their significance in the history of U.S. constitutional law, as well as on social relations in the country. Analysis of these cases resulted in creating a chart presenting the changing approach of the highest judicial tribunal in the United States towards African-Americans:

YEAR	CASE NAME	DECISION	PATTERN
1842	Prigg v. Pennsylvania	silent consent to slavery	RACISM
1847	Jones v. VanZandt	silent consent to slavery	continuity
1857	Dred Scott v. Sandford	slavery constitutional	continuity
1873	Slaughterhouse Cases	theoretical protection of racial inequality	slight change
1880	Strauder v. West Virginia	only-white juries unconstitutional	slight change
1883	Civil Rights Cases	*Civil Rights Act* in part unconstitutional	continuity
1896	Plessy v. Fergusson	separate-but-equal doctrine	continuity
1935	Grovey v. Townsend	group discrimination affirmed	continuity
1944	Smith v. Allwright	*Grovey* overruled	slight change
1947	Louisiana v. Resweber	second attempt to execute a black co-nvict legal	continuity
1948	Shelley v. Kraemer	racially restrictive agreements constitutional	continuity

YEAR	CASE NAME	DECISION	PATTERN
1950	Sweatt v. Painter	university-based segregation unconstitutional	change – PARTIAL EQUALITY
1950	McLaurin v. Oklahoma State Regents	university-based segregation unconstitutional	continuity
1952	Beuharnais v. Illinois	equal protection prevails over freedom of speech	continuity
1954	Brown v. Board of Education	separate-but-equal doctrine abandoned	significant change – DESEGRE-GATION
1963	Edwards v. South Carolina	peaceful protest of black people constitutional	continuity
1964	Heart of Atlanta Motel v. United States	segregation in interstate motels unconstitutional	continuity
1964	Katzenbach v. McClung	segregation in interstate restaurants unconstitutional	continuity
1966	Brown v. Louisiana	peaceful protest of black people constitutional	continuity
1967	Loving v. Virginia	interracial marriages constitutional	continuity
1968	Jones v. Mayer	racial-based sale of property unconstitutional	continuity
1976	Washington v. Davis	recruitment constitutional if it lacks offi-cial discriminatory character	uncertainty
1978	University of California v. Bakke	rigid quotas unconstitutional, affirmative action constitutional	uncertainty
1986	Batson v. Kentucky	end of racial discrimination in jury selec-tion process	continuity (EQUALITY)
1987	McCleskey v. Kemp	statistical data do not influence death sentence of an African-American	uncertainty
2003	Grutter v. Bollinger	affirmative action constitutional	uncertainty

It is difficult to avoid a conclusion, that the most of the Justices easily adapted to the times there were adjudicating. In the period of deep slavery, they confirmed the lack of any constitutional protection afforded to black Americans, and in most crucial mo-ments of history they even went further by sanctioning slavery and influencing more controversies than ever. If one admits that in 1857 the Court did not have a choice to make a different judgment, it is necessary to carefully analyze Taney's opinion which

could definitely lack the references to constitutional character of slavery. Even the fact that most of the Justices were racists does not justify the decision of the highest judicial tribunal in the country responsible for just interpretation of the supreme law of the land. Only the arguments of original intent to which the *Dred Scott* opinion in part refers may serve as a partial justification of the cruelty of Court's decision, but was it really necessary to go back to the intent of Founding Fathers seventy years after the adoption of the constitution? Probably not. Similarly, after civil war, the Justices decided to shape the scope of newly created equal protection of law clause in a very narrow manner by limiting the governmental efforts to equalize the society, and establishing an absurd doctrine denying the meaning of the Fourteenth Amendment. The *Plessy* precedent could be considered even worse than the *Dred Scott* decision, as it did not appeal to any original intent of the constitution but created a totally new approach fitting in the expectations of former slaveholders and racists from the Southern states. What is important, the government had already established new standards for the treatment of African-Americans, but the majority of the Supreme Court decided to disregard the real purposes of adopting the Thirteenth and Fourteenth Amendments. How is it possible to provide equality establishing at the same time segregation?

There is no doubt that individual attitude of particular Justices marked a dark side of the Supreme Court's history, despite the fact that there were exceptions to the proper understanding of equality among them (Justice Harlan). Furthermore, if one realizes that the separate-but-equal doctrine had survived for more than fifty years, although there were practical chances to overrule this infamous approach, the picture becomes clear: the U.S. Supreme Court did not pass the exam from democracy from the perspective of equal protection of law. This general thought should not concern other aspects of Court's adjudication of that time, such as the separation of powers or interpretation of various constitutional clauses (commerce clause, contracts clause, necessary and proper clause, and many more). But in the area of racial discrimination, the institution became the part of larger campaign aimed at promoting one social group over others. Yet 100 years after *Dred Scott* the Court grew up to the significant change; change which was affected by various reasons, from individual opinions of the Justices, to social and political reasons. Since 1950s one may observe the evolution of the highest judicial tribunal in the United States from an actor assisting the government to an actor playing the main role among the three branches of government. The racial issues, along with general approach towards rights and liberties of American people, such as freedom of speech, freedom of religion, rights of the accused in criminal trials, and due process of law in general, became tools in Court's hands on its way to achieve supremacy in the country. If someone has the power to decide about the final meaning of the Constitution, he has the power to decide about the final meaning of the legal, social, economic, and political relations. As Justice Robert Jackson stressed once, the Supreme Court's decisions were not final because they were infallible, but they were infallible because they were final[73]. In the Fall of 2011 the Court again shall confront the issue of

[73] *Brown v. Allen* 344 U.S. 443 (1953).

affirmative action, thus influencing the current status of state-based politics towards racial minorities in America. *Fisher v. University of Texas* may become another milestone case on the way of shaping the proper image of race by U.S. judiciary and thus by the American society[74].

It is a pity, that most of the Justices sitting historically on the Court did not use the power of judicial review to end the artificial divisions within the society, but instead they used it to justify the separation of races. It is difficult to reject the feeling that today the United States of America still pay for these mistakes. This or the other way.

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